STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 14, 2014
v	No. 306806 Saginaw County Circuit Court
ARMANDO BERMUDEZ, Defendant-Appellant.	LC No. 10-035151-FH

Before: WHITBECK, P.J., and FITZGERALD and O'CONNELL, JJ.

PER CURIAM.

A jury convicted defendant of felon in possession of a firearm, MCL 750.224f; possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; and possession of marijuana, MCL 333.7403(2)(d). The trial court sentenced defendant as an habitual offender, third offense, MCL 769.12, to a prison term of 24 months to 10 years for the felon in possession conviction and to a consecutive two year term for the felony-firearm conviction, and to a fine of $250 for his possession of marijuana conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from a July 9, 2010, raid of a Saginaw residence that resulted in the seizure of a 357-revolver handgun, handgun ammunition, a bulletproof vest, a small amount of a green substance resembling marijuana, a plastic bag containing trace amounts of a white substance, two scales, and several items of correspondence addressed to defendant. Analysis of the substance identified the green substance as marijuana.

The handgun had been found wrapped in plastic bags and hidden inside a purse hanging in a bedroom closet within the residence. Police found one scale inside the same bedroom closet and a second scale hidden in the headboard of the bed. Photographs of the inside of the residence admitted into evidence at trial demonstrated that at the time of raid the home contained many personal items such as clothes, furniture, and prescription medications appearing to belong to defendant's family.

Defendant testified that he and his family had previously lived at the residence and that he and his wife shared the bedroom wherein the handgun was found in the closet. He testified that the seized contraband was not his and that he had no idea how it came to be in the house. He denied being in the house after moving out on July 1, 2010. However, a detective testified

that he observed defendant enter and leave the residence several days after defendant allegedly vacated the house.

Defendant stipulated to the introduction of a certified record showing that he had previously been convicted of delivery or manufacture of less than 50 grams of cocaine. The jury instructions given by the trial court regarding the use of this evidence included the following directives:

> There is evidence that the defendant has been convicted of a crime in the past. You may consider this evidence only in deciding whether you believe the defendant is a truthful witness. You may not use it for any other purpose.
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> * * *
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> Evidence has been introduced in the form of an exhibit, to show that the defendant committed a crime in the past for which he is not on trial. If you believe this evidence you must be very careful only to consider it for certain purposes. You may only think about whether this evidence tends to prove one of the elements of the offense charged in Count I, namely, that defendant was convicted of a specified felony. You must not consider this evidence for any other purpose. For example, you must not decide that it will--shows [sic] that the defendant is a bad person or that he is likely to commit crimes. You must not convict the defendant here because you think he is guilty of other bad conduct. All the evidence must convince you beyond a reasonable doubt that the defendant committed the alleged crime or you must find him not guilty.

Defendant argues that his convictions of felon in possession of a firearm and felony-firearm must be reversed because the prosecution failed to present sufficient evidence to sustain the convictions. We disagree.

In reviewing a sufficiency of the evidence question, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the offense were proven beyond a reasonable doubt. We do not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Bulls*, 262 Mich App 618, 623; 687 NW2d 159 (2004); *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). A trier of fact may make reasonable inferences from direct or circumstantial evidence in the record. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

MCL 750.224f(2) provides that "[A] person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until" five years after various conditions have been met." MCL 750.224f(2). A "specified felony" includes a felony resulting from the "unlawful manufacture, possession, importation, exportation, distribution, or dispensing of a controlled substance." Under MCL 750.225b(1), the elements of felony-firearm are that the defendant possessed a firearm during the commission of or the attempted commission of a felony. "Possession of a firearm can be actual or constructive, joint or exclusive." *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011). The element of

"[p]ossession can be proved by circumstantial or direct evidence and is a factual question for the trier of fact." *Id*.

The certified record entered into evidence by stipulation showed that defendant had previously been convicted of delivery or manufacture of less than 50 grams of cocaine. This controlled substance conviction qualified as a specified felony. MCL 750.224f(6)(ii).

Defendant contends that the prosecution failed to prove beyond a reasonable doubt that he possessed a firearm. We disagree. In *People v Minch*, 493 Mich 87; 825 NW2d 560 (2012), our Supreme Court held that "for possessory crimes in Michigan, actual possession is not required; constructive possession is sufficient." *Id.* at 91. The *Minch* Court further stated that "[t]he test for constructive possession is whether 'the totality of the circumstances indicates a sufficient nexus between defendant and the contraband.'" *Id*. at 91-92, quoting *People v Johnson*, 466 Mich 491, 500; 647 NW2d 480 (2002). Circumstantial evidence can be used to prove the elements of an offense. *Johnson*, 293 Mich App at 83. Determining which evidence to accept and which witnesses to believe is the task of the jury. *Milstead*, 250 Mich App at 404.

Here, the prosecution submitted sufficient evidence to prove beyond a reasonable doubt that a sufficient nexus existed between defendant and the gun found hidden within the purse in the bedroom closet at the 720 Miller Street residence. Defendant admitted to residing in the same house at least up until July 1, 2010, which was only eight days prior to the police raid that resulted in the seizure of the firearm. Defendant also admitted that the gun was found in the bedroom he and his wife shared. Photographic evidence and trial testimony showed that at the time of the raid the 720 Miller Street house still contained many personal items belonging to defendant and his family. In addition, defendant's testimony that he had not reentered the house at 720 Miller Street since vacating it was contradicted by testimony offered by a detective. The detective testified that on July 6, 2010, just three days before the raid, he observed defendant leave the home with another individual. This evidence was sufficient to allow the jury to conclude beyond a reasonable doubt that defendant had at least constructive possession of the gun. *Minch*, 493 Mich at 91-92.

The offense of felon in possession of a firearm can serve as the predicate felony for felony-firearm. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003). As indicated above, there was sufficient evidence submitted at trial to substantiate defendant's conviction for felon in possession. Defendant was not denied due process of law because sufficient evidence was admitted at trial to justify a rational trier of fact finding beyond a reasonable doubt that defendant was guilty of both felon in possession of a firearm and felony-firearm.

Next, defendant argues that defense counsel rendered ineffective assistance by not offering to stipulate to his status as a convicted felon in order to prevent the jury from discovering the exact nature of his prior conviction. See *People v Swint*, 225 Mich App 353, 377-379; 572 NW2d 666 (1997). However, *Swint* is factually distinguishable in that the trial court in that case wrongfully refused to accept the defendant's stipulation to a prior felony conviction. *Id*. at 377. *Swint* did not hold that a failure to request such a stipulation amounts to deficient performance on the part of counsel. *Id*. at 377-380. Nonetheless, the *Swint* Court ultimately found that even in cases where such a stipulation was improperly denied by the trial court, the error is harmless unless shown to be prejudicial. *Id.* at 379. Defendant has not

demonstrated that he was prejudiced as a result of counsel's failure to stipulate to the prior felony conviction.

Defendant also argues that the trial court erred by instructing the jury that it could use the prior conviction for any purpose and that counsel should have requested a limiting instruction.[1] We disagree. Even assuming that the trial court erred by instructing the jury that it could consider defendant's prior conviction when deciding whether defendant was a truthful witness, the trial court mitigated any possible prejudice when it instructed the jury not to consider the evidence of defendant's conviction for any purpose other than determining whether defendant was convicted of a specified felony for purposes of establishing the "felon" element for felon in possession. See *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995).

Finally, defendant argues that the judgment of sentence must be amended because the jail credit calculation was incorrect. Defendant asserts that he is entitled to credit for 55 days served between July 27, 2011, and September 20, 2011. He concedes that this time served may have been in connection with other, non-related charges, but nonetheless argues that credit for this time served should still be granted because the trial court indicated that his sentences in the two matters would run concurrently. We disagree.

We review de novo the question of whether a defendant is entitled to credit for time served in jail prior to sentencing. *People v Waclawski*, 286 Mich App 634, 688; 780 NW2d 321 (2009).

Defendant relies on MCL 769.11b and *People v Stead*, 270 Mich App 550, 551; 716 NW2d 324 (2006), to support his claim. MCL 769.11b provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

[1] Defendant's combination of separate questions regarding ineffective assistance of counsel and trial court error in instructing the jury is improper. MCR 7.212(C)(5).

Defendant's reliance on MCL 769.11b is misplaced. Defendant is seeking credit for an offense other than that for which he was convicted in this case. Defendant's reliance on *Stead* is also misplaced because that case holds that parolees convicted of new crimes are not entitled to credit for time served on the previous offense for which they were on parole. *Stead*, 270 Mich App at 551-552. Defendant is not entitled to any additional credit for time served.

Affirmed.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell